No. 415-2020

In the Supreme Court of the United States

April Term, 2020

Pan Chen,

Plaintiff - Petitioner,

v.

Town of Touroville

Defendant - Respondent.

On Writ of Certiorari for Review from the Appellate Division of the Fuchsberg Supreme Court

PETITIONER'S BRIEF ON THE MERITS

Team 6

Counsel for Petitioner

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QUESTIONS PRESENTED

I. Whether a law prohibiting the wearing of religious garb violates the Free Exercise Clause when the law, in effect, is not neutral or generally applicable because the law exempts similar items worn for secular reasons; and

II. Did the Town of Touroville act with animus when it removed the religious exemption from § 23-2 of the Town's Code after a petitioner who used the exemption for years won a judgment against the removal sponsoring Town Councilwoman?

STATEMENT OF THE CASE

Factual Background

Adoption of the Challenged Ordinance. On May 16, 2017, the Town of Touroville (the "Town") adopted ordinance § 23-2, repealing the religious exemption for headdresses that existed in the prior version of the ordinance. Record at 4. Many people in the Town enjoyed the exemption, including Petitioner Mr. Pan Chen. R. at 4. Chen is a local businessman who often visits the Town's municipal building on official business. R. at 4. As a practicing Sikh, Chen grows his hair and ties it down in a turban. R. at 4. Prior to the Town amending the ordinance, Chen enjoyed an exemption where he did not have to remove his turban for entrance into the building. R. at 4-5.

Public Hearing. Before the Town repealed the religious exemption and adopted ordinance § 23-2, the Town held a public hearing. R. at 4. During the comment period of the hearing, the Town continued following its traditional rules of civil procedure and granted two minutes of speaking time to each resident that wished to address the Town Council. R. at 4. As part of their rules, the Town Council did not engage in questions or comments. R. at 4-5. Instead, the Town Clerk informed each speaking resident when their time expired and continued to the next resident. R. at 5.

At the public hearing, law enforcement officers focused on threats of terrorism to the Town. R. at 5. Chief Victor Coyner of the Town Police Department and Sheriff Carol Mackay of the Lander County Sheriff's Office testified about concerns that various criminals would conceal weapons into headdresses and claim

a religious exemption to bring them into the municipal building and courtrooms. R. at 5. On the other hand, at the public hearing, residents focused on Chen. R. at 5. Some residents commented that they thought it was unfair that Chen was given an exemption to wear his turban while the Town denied "real Americans" the right to wear cowboy hats. R. at 5. At the public hearing, a resident was seen wearing a shirt that depicted a cartoon image of Chen wearing a turban with a light fuse extending out from the top of his turban. R. at 5.

Chen defended the religious exemption and argued that the real reason the Town contemplated the repealment was because his business recently won a large judgment against Town Councilwoman, Lillian Flanagan. R. at 5. At the conclusion of the comment period of the hearing, the Town Supervisor thanked the residents for their comments and concluded the public hearing. R. at 5

After the repeal of the religious exemption. On May 19, 2017, Chen entered the Town's municipal building and stood at the security screening line. R. at 6. As he waited, a person gasped and loudly said that Chen was the person from the newspaper. R. at 6. Michael Russo, a Town Police Officer, told Chen to remove his hat, jacket, belt, and shoes. R. at 6. Chen complied and removed everything except his turban. R. at 6. Russo then demanded that Chen needed to remove anything on top of his head, indicating that Chen needed to remove his turban, but Chen said that his turban has a significant religious purpose and cannot be removed in public. R. at 6. Russo told Chen that he "does not care" and that if Chen did not remove the turban, he would have to leave the building. R. at 6. After Chen said that he could

not leave the building since he had urgent business in the court, Russo threatened Chen by saying that he would arrest him. R. at 6. Chen then decided to collect his items and leave the building. R. at 6.

Sikhism Public Manifestation. Traditionally, Sikh men grow their hair to long lengths. R. at 6. Instead of going in the public with loose long hair, Sikh men fit their hair into a turban by forming a bun with their hair atop their head and stuffing it under a padka, which is an under-turban that is meant to hold the regular turban in place. R. at 7. It takes approximately ten minutes to remove and reapply the turban. R. at 7. Sikhs are only supposed to remove the turban in the privacy of their home, in front of members of their family, and they consider it offensive to require them to remove the turban in public. R. at 7.

Procedural Background

State of Fuchsberg Supreme Court. Chen filed a complaint under 42 U.S.C. 1983 against the Town alleging infringement of his right to the free exercise of his religion since the Town's law required him to choose between adherence to religious tenets or the discharge of his business affairs. R. at 6. Chen seeks (1) monetary damages, (2) a declaration that ordinance § 23-2 is unconstitutional either on its face or as applied, and (3) an injunction against future enforcement of the ordinance. R. at 6. Following the complaint, the Town moved to dismiss claiming the Town ordinance did not violate the First Amendment because the Town designed the ordinance to protect the safety of the general public. R. at 6. After hearing testimony from Chen and the Town, Honorable Marion A. Perone granted

the Town's Motion to Dismiss, referencing the "reasons stated on the record in open court." R. at 7. Judge Perone found that Chen's claims do not rise to an infringement of religion given the Town's need to promote safety. R. at 8.

Appellate Division of the Fuchsberg Supreme Court. The order granting the Town's motion to dismiss was affirmed by the Appellate Division on April 18, 2019. R. at 3.

Supreme Court of the United States. Chen petitioned for this Court to review the lower court's decisions and this was granted. R. at 20

SUMMARY OF THE ARGUMENT

The need to properly balance the First Amendment's protection of the free exercise of religion with the interests of local citizens for securing public buildings has become increasingly important as citizens of Fuchsberg are increasingly fearful for their security. This case presents two distinct issues sharing a common theme: a legislator using the power of government, under the appearance of a law of neutrality and general applicability, to restrain the free exercise of religion citizens were previously enjoying. Understanding both of the issues in the case illustrates the problems inherent in the Town's decision to amend ordinance § 23-2 and why the Appellate Division of the Supreme Court erred when it affirmed the Supreme Court's granting of motion to dismiss in the Town's favor.

The Town's Ordinance is Not Neutral or Generally Applicable. The Town's ordinance is not neutral or generally applicable and is, therefore, subject to the strict scrutiny test. When the government attempts to infringe upon an individual's

right to freely exercise their religion under the First Amendment of the United States Constitution, courts analyze the constitutionality by asking if the law is neutral and generally applicable. If not, then courts subject the law to the strict scrutiny test where the local or state government has to prove that the law furthers a compelling state interest and is narrowly tailored to achieve that interest.

The Town's ordinance fails to be neutral because the Town struck the previous religious exemption but kept the exemption for medical purposes. When a law departs from neutrality, even subtly, the law fails. In addition, laws fail neutrality when a less restrictive means exists to effectuate the purpose of the ordinance. When applying all of these factors to the Town's passing of the ordinance, that removed the religious exemption, the ordinance fails neutrality.

The ordinance also fails to be generally applicable. A law cannot be generally applicable if the law regulates religious conduct while failing to regulate secular conduct that may be at least as harmful to the legitimate government interests. The Town's ordinance fails because it is underinclusive by maintaining medical exemptions and repealing religious ones.

Since the Town's ordinance, in effect, fails to be neutral or generally applicable, Courts should apply the strict scrutiny test to analyze if the government has a compelling interest and the legislation is narrowly tailored to pursue those interests. The Town's ordinance fails the test because the ordinance is not narrowly tailored to fit the interest, since the provision includes a medical exemption even

though medical equipment tends to be larger than tightly wrapped religious headdresses.

Even though the ordinance fails to be neutral or generally applicable, the ordinance would fail the mere rational basis review. The rational basis test allows a law to be sustained if it advances a legitimate government interest, even if the law seems unwise. If the legislature enacts a law with animosity against a party, the law fails the rational basis test. Since the Town acted with animus against Chen, the ordinance fails under the rational basis test.

The Town Acted with Animus. Legislation should not be amended, enacted, or repealed based on animus against an individual or group of people. Courts evaluate animosity the same way it analyzes neutrality of the law. Therefore, motives, acts, or omissions by the legislature may be considered when evaluating animus.

The Town amended its ordinance because of animus against Chen. After Chen won a substantial judgment against a Town Council member, the Town worked to amend the ordinance Chen enjoyed. During the Town's public hearing, the Town Council chose not to say anything discriminatory, and due to their continued adherence to their own rules of civil procedure, they did not address any public comments. Thus, by not distancing itself from the discriminatory comments, the Town adopted the sentiments of the unruly speakers.

Lastly, a law is found to be passed with animus when it imposes wide-ranging deprivations upon a group by straying from the historical territory of the

legislature. The ordinance here imposes a deprivation upon Sikh followers, since it maintains the secular medical exemption even though there were no reported incidents involving the religious exemption in over 50-years. A government should not act with a personal vendetta against one or more persons by enacting a law that seems to be neutral but has an unfair effect. Individuals should be sure of their right to exercise their religion free from the pettiness of another.

Standard of Review

Both the State of Fuchsberg Supreme Court and the State of Fuchsberg Court of Appeals granted and affirmed the Town's motion to dismiss based on legal issues, as the facts are not disputed. Courts assume the truth of the well-pleaded factual allegations of the complaint; however, only a well-pleaded complaint that states a claim for relief will survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 551 (2009). Generally, questions of law are reviewed de novo. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 573 U.S. 559, 563 (2014).

ARGUMENT

The two issues presented revolve around a legislator using the power of government, under the appearance of a law of neutrality and general applicability, to restrain the free exercise of religion to eliminate freedoms citizens had previously enjoyed. When the Town of Touroville (the "Town") amended the ordinance, it eliminated the religious exemption and maintained the secular exemption. Doing so, the Town passed an unconstitutional ordinance because the amended ordinance

unfairly targets religion, and the legislative body passed the amended ordinance with animus. This Court should reverse and remand the lower courts' decisions and confirm that when legislators use the power of government to restrain the free exercise of religion unfairly, that law will be found unconstitutional.

I. The Town's amended ordinance violates the Free Exercise Clause of the First Amendment.

The Free Exercise Clause in the First Amendment of the United States Constitution protects individuals from the government either compelling affirmation of religious beliefs or punishing the expression of religious doctrines it believes to be false. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990); *see* U.S. Const. amend. I. However, the right to exercise an individual's religion is not absolute and may be subject to restrictions if the intrusion on the right to free exercise is a side effect of a generally applicable law. *See Smith*, 494 U.S. at 877. This Court has stated that individuals have protection against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *Lyng v. Northwest Indian Cemetery Protective Association,* 485 U.S. 439, 450 (1988)).

A. The Town's ordinance should be tested under the Strict Scrutiny Test.

In *Sherbert v. Verner,* this Court applied the strict scrutiny test for the plaintiff's claim of infringement on her free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398 (1963). Later, in *Smith*, the Court applied a lesser standard that simply requires the law be neutral and generally applicable; if the law violated

those requirements, it would be analyzed under strict scrutiny. *Smith*, 494 U.S. at 872; *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993).

The United States Legislature expressed hostility to the lessened standard set forth in *Smith* by passing the Religious Freedom Restoration Act ("RFRA"). *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). The RFRA prohibited "government[s]" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that…interest." 42 U.S.C. § 2000bb-1.

In *City of Boerne*, a Florida city denied a permit for a Catholic Church required for renovations since the Church was part of a "historical district." *City of Boerne*, 521 U.S. at 512. When the church brought suit under the RFRA, this Court held the RFRA unconstitutional. *Id.* at 535. This Court held that the RFRA limited States' rights to enact legislation when the legislature might impact the free exercise of religion. *See id.*

Following this Court's holding that the RFRA was unconstitutional, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). 42 U.S.C. 2000cc *et seq.* RLUIPA governs land use regulations and regulations concerning institutionalized individuals. *Id.* Section 3 of RLUPIA, mirroring the RFRA, states that

> "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--(1) is in

> furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

§ 2000cc-1(a); *see also Holt v. Hobbs*, 574 U.S. 352, 357 (2015). Although RLUIPA is narrower in range than the RFRA, the enactment of religious freedom legislation illustrates that Congress shows hesitancy to allow infringement of free exercise of religion. *Holt*, 574 U.S. at 357.

Although *Smith* has not been overruled, this Court did state that a law that fails to satisfy the requirements of neutrality and general applicability must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. *Church of Lukumi Babalu Aye*, 508 U.S. at 531. Neutrality cannot be passed merely by showing that the law is facially neutral. *Id.* Similarly, to be generally applicable, a law cannot single out religious conduct as the focus of regulation. *Id.*

1. The Town's ordinance fails to be neutral.

In *Church of Lukumi Babalu Aye*, this Court stated, "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend those exemptions to 'religious hardship' cases without compelling reason.'" *Id.* at 537. In that case, the City of Hialeah passed ordinances that addressed the issue of religious animal sacrifice while leaving an exemption for slaughtering by "licensed establishments" of animals "specifically raised for food purposes." *Id.* at 527-28. This Court held that the ordinances were not neutral when considering the effect and operation of the ordinances. *Id.* at 536.

This Court found that the ordinances at play unfairly, and unjustly, targeted the Santeria religion because the ordinances were passed "because of" not merely in "spite of" the practice of the Santeria religion. *Id.* at 541. This Court looked at the events preceding the enactment of the non-neutral ordinances, and found, just like the facts in this case suggest, that the City of Hialeah made no plans to address the issue at play prior to the enactment of the discriminatory ordinances. *Id.*

Since the Town's ordinance permits an exemption for medical reasons but struck the previous religious exemption, neutrality is at issue here.[1] Record at 4-5. The ordinance now reads, "Headdress – is any article unnatural to the wearer that fully or partially covers the wearer's head or face unless the said article is worn for a legitimate, verifiable medical purpose." R. at 21. Similar to the laws at issue in *Church of Lukumi Babalu Aye*, the Town's ordinance devalues and eliminates religious headdresses by judging them as less important than medical headdresses. *See Church of Lukumi Babalu Aye*, 508 U.S. at 546-47.

The Free Exercise Clause also forbids subtle departures from neutrality. *Id.* at 534. The Supreme Court held in *Church of Lukumi Babalu Aye* and in *Masterpiece Cakeshop* that various factors can influence the neutrality of an ordinance. The factors include: the historical background of the decision under

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[1] The challenged portions of the ordinance as follows:

§ 23-2 Definitions:

As used in this chapter, the following terms have the meanings indicated:

Headdress — is any article unnatural to the wearer that fully or partially covers the wearer's head or face unless the said article is worn for a legitimate, verifiable medical purpose. ~~or worn to comply with a genuine religious belief.~~

Outerwear — includes shoes, coats, jackets, sweaters, scarfs, belts, and any duplicative layer of clothing. However, outerwear does not include the first outer layer of clothing, such as pants, overalls, shirts, blouses, skirts, dresses.

challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body. *Church of Lukumi Babalu Aye*, 508 U.S. at 540; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Here, the Town amended the ordinance after a public hearing where members of the public expressed strong hostility towards Chen. R. at 26. The public hearing was part of the series of events that led to the repeal of the religious exemption from the Town's ordinance. At the public hearing, one person was wearing a t-shirt depicting a man wearing a turban with a bomb coming out of the turban. R. at 26. While there was no official statement from the Town's Council members, they allowed this behavior and did nothing to curb the open resentment. Thus, the Town Council members adopted the statements as their own. R. at 4-5, 17. Therefore, based on the facts alone the Town's ordinance fails neutrality.

Lastly, Courts also approach neutrality by testing how the government achieves its restrictions. *Church of Lukumi Babalu Aye*, 508 U.S. at 538. Since a less restrictive means exists to effectuate the purpose of safety and security in the municipal building, the Town's ordinance fails under neutrality. While removing a headdress might constitute one way to inspect visitors and assist in securing the municipal building, a drug-sniffing dog would also achieve the same goals in a less restrictive way.

Although more often considered in a criminal context, this Court has lauded the use of drug-sniffing dogs for their unique ability to directly dispel suspicion quickly with minimal intrusion. *See U.S. v. Bloomfield*, 40 F.3d 910, 917 n.7 (8th Cir. 1994) (recognizing that the Supreme Court considers drug-dog sniffs "often the fastest and least intrusive method of resolving suspicions during an investigative stop"); *See U.S. v. Place*, 462 U.S. 696, 707 (1983) (recognizing that the manner in which information is obtained through a drug sniffing dog is "much less intrusive than a typical search").

2. The Town's ordinance is not generally applicable.

General applicability relates to neutrality. *Church of Lukumi Babalu Aye*, 508 U.S. at 531; see also *Smith*, 494 U.S. at 879-81. As both are interrelated, the failing of one typically signals the failing of the other. *Church of Lukumi Babalu Aye*, 508 U.S. at 531. "The principal that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious beliefs is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Id.* at 543.

The general rule is that an indirect burden on religion imposed by a neutral and generally applicable law does not violate the First Amendment. See *Smith*, 494 U.S. at 879. However, a law may not be generally applicable if it singles out religious conduct via the challenged statute. *Id.* A law fails to be generally applicable if the law is "substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the

legitimate government interests purportedly justifying it." *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d. Cir. 2014).

Similar to the analysis for neutrality, the Town's ordinance exempts medical "headdresses" as long as the medical reason is legitimate and verifiable. Thus, the Town's ordinance fails to be generally applicable as the ordinance lays out an exemption that is underinclusive because the allowance of medical wear may be at least as harmful as the possible harm of religious garbs. *Id.*

Here, the Town's ordinance fails under general applicability because the ordinance uses the word "headdress" when referring to garb worn on the head. R. at 25. Merriam-Webster's Dictionary defines "headdress" as "an often elaborate covering for the head," accompanied by illustrations depicting Native American religious headdresses and Egyptian religious headdresses. *Headdress*, MERRIAM-WEBSTER.COM (2020). Although the Town's ordinance does not explicitly define "headdress" to have a religious purpose, the ordinance nevertheless fails to be generally applicable because it is underinclusive.

B. The Town's ordinance fails under strict scrutiny.

To satisfy the strict scrutiny test, "a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). The Town's ordinance fails the strict scrutiny test. While the Town does have a valid state

interest in the safety and security of their citizens, the ordinance is not narrowly tailored to fit the interest.

The Town's ordinance is not narrowly tailored because the ordinance keeps in place an exemption for articles worn for a legitimate, verifiable medical purpose. R. at 21. As mentioned above, prior to the public hearing there was an exemption for religious garb. R. at 5, n.3. The ordinance meant to secure the municipal building does not pass the strict scrutiny test under the current form because the ordinance does not include a method to search the medically necessitated "headdress." Medical equipment tends to be larger than a tightly wrapped religious headdress, yet no provision addresses the security concerns arising from medical wear.

Finally, the Town failed to show evidence that the Town had problems with patrons of the municipal building smuggling contraband into the municipal building. Therefore, the Town has not shown that there is a compelling interest in banning religious "headdresses" from the municipal building. Nor has the Town shown any evidence that requiring the removal of religious garb is the least restrictive means available for security. As stated earlier, a drug-sniffing dog would accomplish the same task without requiring removal of a "headdress."

C. Even if strict scrutiny does not apply, the Town's ordinance fails under the rational basis test.

The rational basis test applies to laws of neutrality and general applicability. *See Smith*, 494 U.S. at 879. This Court has explained rational basis in the context of Equal Protection cases more so than Free Exercise cases. *Romer v. Evans*, 517 U.S. 620, 632 (1996). In *Romer* this Court said, "In the ordinary case, a law will be

sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* at 632.

Although the rational basis test allows for significant deference to the legislative body that created the law in question, a law may still fail the rational basis test. *Id.* This Court requires evidence of a rational link between the legislation enacted and the interest of the legislative body. *Id.* If the Court senses the legislature enacted the law because of animosity towards a party affected by the law, then the law cannot stand. *Id.* at 634.

The Town's ordinance, on its face, may seem to pass the rational basis test. However, as discussed below, the Town acted with animus, thus causing the ordinance to fail under the rational basis test. Courts "insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632. Because the Town maintained a secular exemption and removed the religious exemption for "headdresses," the Town had the burden of producing evidence of contraband infiltrating the municipal building due to the religious exemption. Since the Town did not meet its burden and the evidence, as indicated below, proves that the Town acted with animus against Chen, the ordinance does not survive the rational basis test.

II. When a government enacts a statute with animus against a group, the Court declares the law as being unconstitutional.

When the court analyzes the legality of a challenged state or local statute, "[it] will be sustained if it can be said to advance a legitimate government interest,

even if the law seems unwise or works to the disadvantage of a particular group." *Id.* The Court uses the equal protection clause to provide guidance and discipline for the legislature, so they can know what sort of laws it can pass. *Id.* Challenged laws that do not implicate an inherently suspect class, or a fundamental right are ordinarily decided based on what sort of characteristic the challenged law uses to distinguish between groups. *Bishop v. Smith*, 760 F.3d 1070, 1097 (10th Cir. 2014).

For most classifications, courts use the rational-basis test where any reasonable fact can provide a rational basis for the classification. *Id.* at 1098. Away from the traditional test, when the court detects animus towards an individual or a group, the court applies a heightened rational-basis test. *Id.* at 1099. The review has been given different names such as rational basis with bite, rational basis with teeth, or the rational basis plus. *Id.* When the test reveals a "colorable claim of animus," the law falls as being unconstitutional. *Id.* at 1103.

Here, the Town acted with animus towards Chen when it removed the religious exemption under § 23-2 of the Town's Code. The Town enacted the original ordinance over 50-years prior to the suit between Chen and Flanagan, but once Chen won the suit Flanagan "sponsored the change [of] the ordinance [to] specifically target[]...Chen." R. at 13. Since the change was passed with animus against Chen, this Court should declare it unconstitutional.

A. The Court searches for animus by analyzing the motivations of the legislature for enacting the law.

The Court evaluates a challenged law for animus by focusing on the legislative motive behind the enactment. *Bishop*, 760 F.3d at 1099. The legislator's

motives can fall anywhere on a spectrum of hostility towards a particular group or individual. *Id.* On the weaker end, a legislative motive may be to exclude a particular group from one's community for no reason other than an irrational prejudice against that group; on the extreme end, legislators may desire to harm a politically unpopular group. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Falling in the middle of the spectrum, courts find animus when legislators are motivated solely to call one group "others" in the law with the goal to separate them from the rest of the community. *Romer*, 517 U.S. at 635. Regardless of where the level of animus sits on the spectrum, animus is implicated.

Here, Respondents claim that they needed to create a uniform security process for all people who enter the Town's municipal building and the only way to do this was to remove the religious exemption. R. at 14. Even though the Town's citizens expressed concerns over security, there have been no reported safety concerns due to the religious exemption. R. at 14. Also, the Town chose to remove the public manifestation of religious affiliation exemption but left the medical exemption intact. The Town has failed to prove a link between removing just the religious exemption and the security concern they claim to be the reason behind the removal. R. at 14.

1. By removing the exemption after Chen won a judgment against Councilwoman Flanagan, the Town acted with animus against him.

Courts evaluate whether a legislature acted with animus by assessing governmental neutrality factors, similar to the assessment for determining whether strict scrutiny should apply. *See Church of Lukumi Babalu Aye*, 508 U.S. at 542. As

stated earlier, factors relevant to this assessment include "the historical background of the decision...the specific series of events leading to the [law]..., and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* at 540. The factors test the challenged law to determine whether the law is discriminatory and was enacted "because of" a specific individual or group of people *Id.*

When a legislature enacts a law "because of" a specific individual or group of people, the Court finds animus; however, when a legislature enacts a law "in spite of" the group of people, the Court does not find animus. *Id.* at 541. In *Church of Lukumi Babalu Aye*, Santeria followers in the City of Hialeah in Florida wanted to open a church. *Id.* at 525-26. As a part of their religion, they show their devotion by sacrificing an animal in the open. *Id.* After the Hialeah community discovered the prospect of the church opening, the City Council held an emergency public session and passed ordinances prohibiting "a religious group from sacrificing an animal in a religious ritual or...for purposes other than food consumption." *Id.* at 527. This Court found that "official action that targets religious conduct for distinctive treatment cannot be shielded." *Id.* at 534. In that case, this Court found that the "Santeria [religion] alone was the exclusive legislative concern and the ordinances…proscribe[d] more religious conduct that is necessary to achieve their stated ends." *Id.* at 538. Since the court found that the governmental restrictions were "motivated by religious conviction," the court found them to be unconstitutional and void. *Id.* at 547.

After Chen won a large judgment against Councilwoman Flanagan, the Town voted to remove the religious exemption. R. at 28. Since the enactment of the ordinance to the present time, there have been no reported incidents due to the exercise of the religious exemption. R. at 14. In between the original enactment of the ordinance and the removal of the religious exemption, the only change that occurred in over fifty-years affecting the ordinance was that Chen won a judgment against Flanagan. R. at 5.

The Town relies on *Spanks-El*, and claims that the facts in that case are similar to the present case. R. at 10. In that case, the plaintiff practiced Islam and, as a part of his religious practice, always wore a fez atop his head as a religious symbol. *Spanks-El v. Finley*, No. 85 C 9259, 1987 LEXIS 3374, at *1 (N.D. III. Apr. 30, 1987), *aff'd*, 845 F.2d 1023 (7th Cir. 1988). When the plaintiff attempted to gain entry into a courtroom, security denied him access because of his refusal to remove the religious fez. *Id.* at *2. After informing the security officers that the fez was a religious article and could not be removed, the officers indicated that he had to remove it for a security search. *Id.* Due to the plaintiff's refusal to take it off, he could not enter the courthouse and incurred great financial loss in a will contest. *Id.*

Even though the fact pattern in *Spanks-El* seems to be similar to this case, it is distinguishable. In *Spanks-El*, the Cook County Sheriff's Office had a preexisting rule that all visitors had to remove hats for visual inspection. *See id.* Therefore, the rule did not specifically target the plaintiff as it was in effect before he went to the courthouse. *Id.* Here, Chen often visited the municipal building for official business

and the Town always granted a religious exemption for him. R. at 4. Then, after the judgment against Flanagan, the Town removed the religious exemption. R. at 5. Since the Town removed the religious exemption that was not a preexisting rule for Chen, *Spanks-El* is distinguishable from the case today.

2. The Court can find animus in the ordinance's enactment as the Town Council members adopted the sentiments of the unruly speakers during the Town's council meeting.

Under the *Church of Lukumi Babalu Aye* test, courts evaluate the constitutionality of an enactment by assessing legislative or administrative history, including contemporaneous statements made by members of the decision-making body. 508 U.S. at 540. As mentioned above, the factors, together, answer the question of whether the enactment is discriminatory towards a specific individual or group of individuals. Respondents claim that the courts are limited in evaluating just official action, including language of the ordinance and statements of the decision-makers. R. at 12. Courts do not restrict the factor to only official action if the official does not say anything. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

Instead, courts can expand the inquiry to include what was said in town meetings for the purposes of evaluating if the town council members adopted the resident's sentiments. *Church of Lukumi Babalu Aye*, 508 U.S. at 540. Chen's complaint "must indicate that the injury is indeed traceable to the defendant's acts or omissions." *Vill. of Arlington Heights*, 429 U.S. at 261. Here, even though the Town Council members did not say anything discriminatory during the public hearing, Chen can trace his injury to the Town's omissions.

i. The Town continued to follow its own rule of not addressing public comments.

Under *Church of Lukumi Babalu Aye,* a Court evaluates all of the events leading up to the enactment or official policy in question and does not limit itself to just what the Town council members stated. *Church of Lukumi Babalu Aye*, 508 U.S. at 540. During the public hearing, the Town continued to follow its own rule of procedure that "prevent[ed] Town Council members from addressing public comments." R. at 12. Due to this rule, the disparaging comments made at the public hearing could not be directly addressed by the Town Council during the public comment portion. R. at 12. The Town was not forced to adopt or keep maintaining the rule and could have temporarily suspend the rule due to the comments by the citizens. Due to the Town continuing to follow its own rules of civil procedure, the Town did not address the public comments.

Even if the Town did not anticipate disparaging comments made by the residents against Chen, the Town Council members could have temporarily changed the rules to ensure they are not being indirectly discriminatory. The Court looks to the actions or omissions of the decision-makers to find animus in an enactment. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1731. In *Masterpiece*, this Court held that a state was indirectly discriminatory when its civil rights commission displayed extreme hostility to a person's religious beliefs. *Id.* at 1729-32.

Chen was the first public speaker who "expressed concern that the Town did not respect the free exercise of religion." R. at 23. Afterwards, even though several people openly discriminated against him in an open public-setting, the Town

actively continued to adhere to its rules. R. at 17. The Town chose not to abandon the rules or amend them, even after a resident of the Town, Mr. Daniel Johnson, claimed that "radical religions are taking over America...and the Town needed to pass aggressive laws to combat people who do not conform to the American way." R. at 23. Therefore, as the Town continued to follow their rule, their refusal to address the residents' comments constituted a state omission that resulted in discriminatory conduct.

ii. The Town did not go on the record to distance itself from the discriminatory comments made during the public hearing before the vote.

Respondents rely on the fact that the Town Council did not address any of the disparaging comments or religious comments and concluded that this meant that the Town Council members did not display animus against Chen. R. at 11. This is not the correct analysis underlying the animus doctrine. Instead, as this Court stated, the animus test includes, "among other things," statements made by members of the legislature. *Church of Lukumi Babalu Aye*, 508 U.S. at 540. Therefore, the Court may evaluate the present case with all relevant facts and is not limited to the fact that the Town Council did not make disparaging remarks themselves.

By not distancing itself and not making a comment at the conclusion of the public forum, the Town Council indirectly adopted the sentiments of the unruly speakers. R. at 17. The comments during the meeting "cast doubt on the fairness and impartiality" of the Town Council members. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1730. By doubting the fairness and impartiality of the process the

Town followed, the Court can find the necessary link between the way the Town Council voted and the disparaging comments of the residents. At a minimum, the link can represent a weak level of animus on the spectrum that would result in the ordinance being unconstitutional.

3. The Court can find animus in the ordinance by reviewing its legislative history.

Under the *Church of Lukumi Babalu Aye* test, courts evaluate the constitutionality of an enactment by assessing the legislative or administrative history. *Church of Lukumi Babalu Aye*, 508 U.S. at 540. Courts expand this factor by analyzing "statements by members of the decision-making body, minutes of its meetings, or reports." *Vill. of Arlington Heights*, 429 U.S. at 268. As discussed earlier, the Petitioner believes that even though the decision-making body did not state anything discriminatory during the Town Meeting, they kept rules in place that accepted the hostility during the meeting and they did not distance themselves from the disparaging comments. If the Court does not find animus from those, then the Court can discover animus from the minutes of the meeting held on May 16, 2017.

In the meeting, it was clear that the residents were hostile to Chen's religious beliefs. Within the meeting, "the residents appeared to direct their comments and frustration [to] Pan Chen" and, even after the Town Clerk told the audience to quiet down, "the audience continued to cheer and jeer as people spoke [against Chen]." R. at 26. For example, Debra Lux claimed that herself and other members of a Union she represents "fear[] for their safety because foreigners [like Chen] exempted

themselves from security screening [and] walk around without going through the same security process as all the other visitors." R. at 24, 26. Lux later stated that she "knows for a fact that other employees fear [Chen]." R. at 26.

In addition to Lux, other residents openly spoke against Chen and used discriminatory language. Jonathan Martin claimed that the "Town discriminated against 'real Americans'...[by] allow[ing] certain people to wear...weird bulky things on their heads...but did not allow him to wear his cowboy hat." R. at 24. Trevor Jackson claimed that the "Town allowed 'terrorists' to enter the Town Building without going through a full security check." R. at 24. At the meeting, Jackson "wore a shirt depicting a man with a bomb coming out of his head" that looked like a caricature of Chen wearing his turban. R. at 26. The *Lander County Times* found that "residents appeared to direct their comments and frustration at...Chen." R. at 26. There was not a single citizen that defended the removal of the religious exemption.

Respondent argues that the isolated comments do not equate to a discriminatory intent by the Town and are entitled to little or no weight, particularly when they are unclear or conflict with one another. R. at 12. Firstly, the Town residents' comments were not isolated but represented the majority of the meeting, as represented in the minutes. R. at 23-24. Out of the seven people who received the privilege of the floor, five people were discriminatory towards religion or foreigners and associated them with terrorists. R. at 23-24. The meeting was "packed" and, as mentioned earlier, became so hostile that they began "cheer[ing]

and jeer[ing] as the five individuals were being discriminatory." R. at 26. Secondly, the residents' comments are not unclear or conflicting. Rather, over 70% of the comments were discriminatory towards Chen. R. at 23-24.

As discussed earlier, the disparaging comments during the meeting "cast doubt on the fairness and impartiality" of the Town Council members. *See Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1730. Due to the hostility towards Chen, the Town Council members adopted the sentiments of the unruly speakers. R. at 17. Therefore, the Town acted with animus by eliminating the religious exemption.

B. The Court will discover animus since the Ordinance disadvantages some people.

In *Bishop*, Judge Holmes identified two structural aberrations courts should look into to detect animus when deciding the constitutionality of an ordinance: (1) laws that impose wide-ranging and novel deprivations upon the disfavored group and (2) laws that stray from the historical territory of the lawmaking sovereign just to eliminate privileges a group would otherwise receive. *Bishop*, 760 F.3d at 1100. If the law is more burdensome to a class of individuals compared to others, then the law can be found to be unconstitutional. *See Romer*, 517 U.S. at 631.

1. The ordinance imposes a wide-ranging and novel deprivation upon Sikh followers.

In *Romer*, Colorado voters passed a Constitutional amendment that prohibited all legislative, executive, or judicial action at any level of government within the state designed to protect homosexual persons. *Id.* at 634. This Court held that the amendment violated the Constitution because it "imposed a broad and

undifferentiated disability on a single named group" that showed "animosity toward the class of persons affected." *Id.* at 632. The Court held that the classification has to bear a relationship to an independent and legitimate legislative end to ensure that the classification does not serve the purpose of disadvantaging the group burdened by the law. *Id.* at 633.

Here, the new ordinance § 23-2 eliminated the religious exemption for people who publicly manifested their religion but kept the "verifiable medical" exemption where people with a medical purpose do not have to remove their "headdress" for entrance into the municipal building. R. at 5, n.3. The Town has not proved that by striking the religious exemption, they were able to achieve their legitimate legislative end. The strike does not achieve any legislative goal but rather "imposes a special disability upon those persons alone." *Romer*, 517 U.S. at 631. By keeping the medical purpose exemption, the law "seems inexplicable by anything but animus toward the class it affects" since it defeats the purpose of the ordinance in attempting to secure the municipal building. *Id.* at 632. Therefore, even if the Court finds evidence of any animus against Chen, including other religious followers, the Court must declare the enactment to be unconstitutional. *See Bishop*, 760 F.3d at 1100.

2. The Town's ordinance changed after 50-years just to eliminate the privilege that Sikhs would otherwise receive.

Justice Holmes identifies another structural unusualness when Congress goes back and changes something they did before. *Bishop*, 760 F.3d at 1101. Prior to the passage of the Defense of Marriage Act ("DOMA"), Congress deferred to the

States' authority to define "marriage." *U.S. v. Windsor*, 133 S. Ct. 2675, 2692 (2013). With this, multiple States began allowing same-sex marriages and allowed the protection of gays in their community. *Id.* After years of precedent, Congress passed DOMA which was a "radical departure from...tradition." *Id.* The Court found that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage...is strong evidence of a law...disapprov[ing] of that class." *Id.* at 2693.

Here, the Town initially allowed Chen and other religious followers to enjoy the exemption. After over fifty-years of the exemption, the Town went back and eliminated it even though there were no reported incidents involving the exercise of the exemption. R. at 14, 28. Chen availed himself of the exemption often as he visited the municipal building normally for official business. R. at 4. Suddenly, in 2017, the Town eliminated the exemption. R. at 4. Similar to *Windsor*, the Town's enactment of the ordinance was a "radical departure [and] unusual deviation from the usual tradition" of allowing for the exemption. *Windsor*, 133 S. Ct. at 2692.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Court reverse and remand the judgment below.